(2)

No. 04-995

IN THE

Supreme Court of the United States

MERCK & CO., INC., UNUM LIFE INSURANCE COMPANY OF AMERICA, and MERCK & CO., INC., LONG-TERM DISABILITY PLAN FOR UNION EMPLOYEES,

Petitioners,

v.

CELESLIE EPPS-MALLOY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

PAULA MARKOWITZ
Counsel of Record
CHARLES F. X. SZYMANSKI
MARKOWITZ & RICHMAN
Attorneys for Respondent
121 S. Broad Street
Suite 1100
Philadelphia, PA 19107
(215) 875-3100

193723

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether an ERISA plan fiduciary commits a procedural irregularity, resulting in a less deferential standard of review to the fiduciary's benefit determination, when the fiduciary requests an independent medical examination in circumstances which suggest that the fiduciary was not being disinterested, but rather was seeking evidence to support a denial of a claim for benefits.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
STATEMENT OF THE CASE	1
Factual Background	1
Procedural History	6
ARGUMENT	9
I. The Third Circuit's decision does not conflict with the decisions of this Court or of other Courts of Appeals	9
II. The Third Circuit's decision does not conflict with any interest in uniformity, fair claims procedures and/or the encouragement of ERISA plans	11
CONCLUSION	11

TABLE OF CITED AUTHORITIES

Page

Case:

Black & Decker Disability Plan v. Nord,
538 U.S. 822 (2003) 9

STATEMENT OF THE CASE

Factual Background

In 1991, Epps-Malloy was employed as a cook and food service attendant by Merck. That year, she suffered an injury at work, and subsequently applied for long term disability benefits under the Merck Plan. Epps-Malloy was diagnosed with fibromyalgia, chronic pain syndrome, and sarcoidosis, among other conditions. Upon review of her medical records, including the results of various medical examinations, UNUM, Merck and the Merck Plan granted Epps-Malloy long term disability benefits. Subsequently, over the next four (4) years, UNUM, Merck and the Merck Plan sought and obtained updated medical information from Epps-Malloy, including reports of a physician under the employ of Merck, Dr. Stein. These reports reaffirmed Epps-Malloy's earlier diagnosis, and concluded that she had reached maximum medical improvement. Additionally, in 1994, an administrative law judge awarded Epps-Malloy social security disability benefits, retroactive to May 14, 1991, finding her to be totally disabled within the meaning of the Social Security Act.

In December, 1996, Merck, UNUM and the Merck Plan terminated Epps-Malloy's long term disability benefits. Specifically, by letter dated December 31, 1996, Dukes informed Epps-Malloy that her LTD benefits were discontinued as of January 5, 1997. In relevant part, Dukes stated that:

> With reference to your claim, please be advised that upon review of the information that has been provided, you no longer meet the definition of being unable to perform any and every duty of your occupation. . . .

> We received a document dated August 12, 1996 from Dr. Pannullo, M.D. and he indicates that he sees you yearly and that you have been released from his care to return to work with no restrictions or limitations.
>
> We received another documentation from Dr. Williams dated October 28, 1996. This document states that you can perform light duty and he is seeing you every 6 months. Medications are Beconase AQ Nasal Spray, Beconase AQ inhaler, Premarin and Elavil at bedtime. . . .
>
> Based on the medical documentation received to date there is no evidence to support that you are medically unable to perform the duties of your occupation. Therefore, we are unable to extend benefits to you beyond January 5, 1997.

See CA Appendix at p. 459. The letter also advised her of Epps-Malloy's right to appeal this determination. *Id.*

Epps-Malloy subsequently appealed UNUM's wrongful discontinuance of her LTD benefits, and requested a review of her claim by the Disability Plan Administrator. *See* CA Appendix at p. 288. Epps-Malloy indicated that, as UNUM and/or Merck already was aware, Dr. Pannullo was her gynecologist. She also stated that, as per her conversation with Dukes on November 25, 1996, she found it hard to understand that UNUM had lost all of her records. Epps-Malloy indicated that she had already sent copies of her SSA decision and award to UNUM, and that it was in any case strange that UNUM had no record of her SSA award when the Plan required her to apply for such benefits. In any event, she attached an authorization for release of information form,

along with a completed medical questionnaire form, which had been sent to her on November 25, 1996. *See* CA Appendix at p. 290. Finally, Epps-Malloy provided Dukes with the name, address and phone number of her then-current treating physician, Dr. Fred D. McQueen, Jr., M.D. *See* CA Appendix at p. 288.

In January, 1997, UNUM acknowledged receipt of Epps-Malloy's appeal. UNUM also indicated that it needed various chart and diagnostic testing notes from Dr. McQueen. *See* CA Appendix at p. 293.

By letter dated January 15, 1997, Epps-Malloy again stressed to Dukes that Dr. Pannullo was her gynecologist, and that the doctor was a female, and not a male, as was mistakenly indicated in Dukes' prior correspondence to her. Epps-Malloy reiterated that her new physician was Dr. McQueen, and she provided a list of her current medications. *See* CA Appendix at p. 295.

By letter dated January 23, 1997, UNUM requested that Dr. McQueen provide it with "all medical files, diagnostic testing, x-ray results, etc." *See* CA Appendix at p. 297.

Dr. McQueen promptly responded to UNUM's request. On or about January 30, 1997, he faxed UNUM his diagnosis and prognosis of Epps-Malloy's condition, along with his chart notes from her January 7, 1997 examination. *See* CA Appendix at p. 299. He also faxed UNUM various medical documents pertaining to Epps-Malloy's December 23, 1995 admission to Hamlet Hospital. *See* CA Appendix at p. 301.

In the statement and notes Dr. McQueen forwarded to UNUM, he indicated that:

> **She has severe sarcoidosis. She is permanently and totally disabled by Social Security. . . . She has been dx'ed with fibrosyositis and she is on hormone therapy, Premarin and PROventil inhaler. . . . She has skin lesions appearing on her legs from the sarcoid . . . I do not feel it in her best interest to be under any stress due to triggering sarcoid remission . . . Permanently and totally disabled. . . .**

See CA Appendix at p. 299 (emphasis added).

Further, Dr. Thakkar, M.D., in his December, 1995 discharge summary from Epps-Malloy's stay at Hamlet Hospital, indicated that she had a history "of sarcoidosis and hysterectomy and rectal bleeding for which we got more information." Once again, these notes were forwarded by Dr. McQueen to UNUM. *See* CA Appendix at p. 301.

Curiously, despite Dr. Williams' and Dr. McQueen's clear findings that Epps-Malloy was totally disabled and afflicted with sarcoidosis and fibromatosis, UNUM forwarded Dr. McQueen's note to a registered nurse for further review. After consultation with UNUM representative Dukes, nurse Ann Girardo speculated about the thoroughness of Dr. McQueen's analysis in a handwritten note dated February 3, 1997. *See* CA Appendix at p. 312.

By letter dated February 4, 1997, Dukes informed Epps-Malloy that "we have reviewed the additional information that you recently sent us and regret it was not sufficient to reverse out previous decision." Apparently, UNUM ascribed more weight to the "findings" of nurse Girardo, who never examined Epps-Malloy, than to the medical diagnoses of her treating physicians, Dr. Williams, M.D. and Dr. McQueen,

M.D. Dukes went on to state that Epps-Malloy's file would be forwarded to UNUM's quality review section in Maine for an impartial review, as provided for by ERISA. *See* CA Appendix at p. 314.

One day later, on February 5, 1997, Dukes informed Epps- Malloy that "there will be a delay in the appeal process due to the fact that Merck & Company has requested an Independent Medical Exam." Dukes advised Epps-Malloy further that she would subsequently be apprised of the time, date and location of this exam. *See* CA Appendix at p. 317.

On May 8, 1997, Epps-Malloy was examined by a Dr. Gautam Dev, M.D. In Dr. Dev's May 19, 1997 report, he concluded as follows:

> My impression of Mrs. Epps-Malloy is that her symptomatology is not commensurate with her clinical presentation. Considering the normal pulmonary function test and near normal arterial blood gas, I have a difficult time ascribing sarcoidosis as a cause of her symptomatology. She appears to be emotional and I cannot reliably exclude malingering behavior. *On the contrary, the endobronchial sarcoid may be leading to persistent cough and dyspnea.* Chronic sinusitis can also exacerbate a respiratory condition and lead to some degree of shortness of breath. The patient's impaired cardiac status is also a possibility and *an exercise stress test might be able to help answer some of the unanswered questions.*

See CA Appendix at p. 319 (emphasis added).

Finally, on June 4, 1997, Dukes informed Epps-Malloy that her appeal had been denied. Dukes explained that:

> We have received the report from Gautam Dev, MD. The report dated 5/18/97 indicates Dr. Dev performed a Pulmonary functions test and a arterial study (blood gas). The results of these exams were normal. Therefore, your claim will remain terminated.

See CA Appendix at p. 321.

Procedural History

Subsequently, plaintiff Epps-Malloy alleged that defendants Merck and Company, Inc. ("Merck"), UNUM Life Insurance Company of America ("UNUM"), and the Merck and Company, Inc. Long Term Disability Plan for Union Employees ("Merck Plan") violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Section 1132(a)(1)(B), by terminating their long term disability benefits.

In her complaint before the United States District Court for the District of New Jersey, Epps-Malloy sought reinstatement of her long term disability benefits, and past due benefits which were wrongfully denied, and reasonable costs and attorneys fees, among other relief.

Subsequently, UNUM, Merck and the Merck Plan filed a motion for summary judgment. In pertinent part, the District Court denied this motion, noting that Dr. Dev's report was "far from conclusive." The matter was then scheduled to proceed to a bench trial. *See* CA Appendix at p. 11.

On December 27, 2001, the District Court, by Judge Mary L. Cooper, entered judgment in favor of the UNUM, Merck and the Merck Plan. In so doing, the District Court utilized the traditional arbitrary and capricious standard of review for UNUM. Merck and the Merck Plan's actions, rather than a heightened standard of review, and concluded that their actions were not arbitrary or capricious. *See* App. 21a-64a.

Epps-Malloy filed a timely appeal from the District Court to the United States Court of Appeals for the Third Circuit. In its decision, the Third Circuit reversed the judgment of the District Court and remanded the matter for a new trial on the merits. The Third Circuit reached this decision for two reasons. First, the Third Circuit concluded that the District Court failed to apply the appropriate standard of review. Reviewing the record, the Third Circuit found that there was evidence of procedural bias that warranted the application of a moderately heightened arbitrary and capricious standard of review. Specifically, at the appeal stage of the claim, at a point in time where every piece of evidence pointed to the fact that Epps-Malloy was totally and permanently disabled within the meaning of the Plan, Merck intervened in the claims process and ordered an IME by a physician of its won choosing.

The Third Circuit explained that:

> This situation arguably has a quality to it that undermines the administrator's claim to the deference normally owned to plan fiduciaries. Given how favorable the record was to Epps-Malloy prior to Dr. Dev's examination, the most natural inference is that by intervening and

> ordering the retention of Dr. Dev, thus seeking evidence to counter Epps-Malloy's physicians' evaluation, Merck was not being a disinterested fiduciary.

See App. 15a.

At the same time, the Third Circuit stressed that its decision should not deter responsible fiduciaries from seeking additional medical information, and that courts would not penalize such fiduciaries for seeking such information at the appropriate stages of the claims determination process. *Id.* at 16a.[1]

Second, the Third Circuit also held in the alternative that it would in any case set aside the District Court's decision on the grounds that it did not adequately address the defendants' denial of Epps-Malloy's benefits claim in view of her diagnosis of fibromyalgia. *See* App. 17a-18a. Petitioners do not seek review of this aspect of the Third Circuit's decision.

The Third Circuit subsequently denied Petitioners' request for rehearing and rehearing en banc. *See* App. 19a.

---

1. The Third Circuit also noted the possibility that Epps-Malloy's status as a former employee might also trigger a heightened level of review, depending on the Plan's funding mechanism. For example, such a heightened level of review might apply where Merck paid plan benefits out of its general operating funds. *See* App. 14a. The Third Circuit noted that the District Court on remand could allow the parties to supplement the record on the manner in which the Plan was funded, and it left the resolution of this issue to the sound discretion of the District Court. *Id.* at 14a, n.5.

ARGUMENT

The Petition for a Writ of Certiorari should be denied.

I. The Third Circuit's decision does not conflict with the decisions of this Court or of other Courts of Appeals.

Petitioners' primary argument in favor of certiorari being granted rests upon an overstatement of the reach of the Third Circuit's decision. Petitioners repeatedly make the assertion that the Third Circuit effectively held that a fiduciary's request for an IME – in and of itself – warrants the imposition of a heightened level of review of the fiduciary's claim determination. They then go on to argue that such a decision conflicts with the decision of other courts of appeal, some of which have noted that the fiduciary's use of an IME might weigh against an inference of bias in the circumstances of the specific case under review, as well as the decision of this Court in *Black & Decker Disability Plan v. Nord,* 538 U.S. 822 (2003), which noted that the opinions of treating physicians may not be entitled to additional deference. Such arguments are completely without merit.

The Third Circuit *did not* hold that the use of an IME by a fiduciary automatically mandates the use of a heightened level of review of the fiduciary's claim determination. Instead, the court took great pains to stress that it was "the circumstances in which Merck made this request [that] necessarily raise an inference of bias. At the time of the request, every piece of evidence in Epps-Malloy's record – the opinions of two doctors (Dr. Williams and McQueen), a consistent medical history, and an SSA determination that she was totally disabled –supported her contention that she

was disabled." *See* App. 14a-15a. In addition, Merck requested the IME at the appeals stage, rather than the initial determination stage. *Id.* at 15a. In light of this record, the "most natural inference" was that Merck was simply intervening in an attempt to uncover evidence that would support a denial of Epps-Malloy's appeal. As the court stressed, such conduct suggests that "Merck was not being a disinterested fiduciary" entitled to "the deference normally owed to plan fiduciaries." *Id.*

It flows from this decision that in some cases similar to the case at bar, requesting an IME at a time which suggests the purpose of the request is to defeat a particular claim for benefits may well result in the application of a heightened level of scrutiny of the fiduciary's claim determination. At the same time, it is also true that in other, different circumstances, a fiduciary's request for an IME will not have that effect. Indeed, the Third Circuit itself emphasized that it "trust[ed] that courts will not penalize plan administrators for seeking independent medical examinations at appropriate stages of the claims determination process." *See* App. 16a.

Under these circumstances, the bogeyman raised by Petitioners simply does not exist. A court within the Third Circuit may, depending upon the circumstances surrounding the request for an IME, find that it is evidence of procedural bias, or, conceivably, that it suggests no bias was present. It all depends upon the facts of the particular case. Consequently, there is no reason for this Court to intervene in this matter and grant the Petition for Writ of Certiorari, as the danger raised by Petitioners is completely illusory.

II. The Third Circuit's decision does not conflict with any interest in uniformity, fair claims procedures and/or the encouragement of ERISA plans.

For the reasons set forth *supra,* the Third Circuit's decision does not radically change the legal landscape for ERISA plans. It simply ensures that, at least within the Third Circuit, fiduciaries will act with more care in deciding to order IMEs when their apparent purpose is to defeat a claim for benefits. Indeed, the Third Circuit itself disclaimed any general intent to deter fiduciaries from ordering IMEs, and correctly noted that "[f]or a responsible fiduciary, we trust that the incentive to collect enough information to make a responsible claims determination will outweigh the incentive to avoid requesting more information in the hopes of obtaining the most deferential standard of review." *See* App. 16a.

CONCLUSION

For all of the aforementioned reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PAULA MARKOWITZ
Counsel of Record
CHARLES F. X. SZYMANSKI
MARKOWITZ & RICHMAN
Attorneys for Respondent
121 S. Broad Street
Suite 1100
Philadelphia, PA 19107
(215) 875-3100

April 4, 2005